THE RIPPER CASES.

THE General Assembly of Pennsylvania passed an act March 7, 1901, entitled "An Act for the government of cities of the second class." It was restricted by its terms to existing cities of that class, three in number. The act abolished the office of mayor in such cities, and created the office of recorder in its place. It provided for the appointment of the three recorders by the governor, to hold office until after the next usual election provided by law, and until the following election in 1903, thus passing over an election and depriving the electors of an opportunity to elect their own chief executive officers respectively, in these three cities.

Article 3, section 7, of the constitution states: "The general assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts . . . incorporating cities, towns, or villages, or changing their charters, . . . creating offices, or prescribing the powers and duties of offices in counties, cities, boroughs, townships, election or school districts." Yet on *quo warranto* the court of common pleas affirmed the validity of the above act, and the judgment was affirmed upon appeal to the Supreme Court.[1] Mitchell, J., delivered the opinion of the four judges constituting the majority; and Dean, J., delivered the dissenting opinion, in which McCollum, C. J., and Mestrezat, J., concurred.[2]

The court decided that the act was constitutional, or rather, it decided that it could not declare the act to be unconstitutional, principally for the following reasons: —

It is not void on the ground of impossibility of execution.

The constitutionality of the classification of cities having already been upheld, it is for the legislature and not for the court to determine what differences of system shall be prescribed for differences of situation.

---

[1] Commonwealth *ex rel.* Elkin, Atty.-Gen. *v.* Moir, 49 Atl. Rep. 351, May 27, 1901.

[2] The Philadelphia Press for October 15, 1901, gives in full what it alleges was the talk over the telephone between Judge Potter of the Supreme Court and Governor Stone, the governor of the state, about the first of May last, which it also published in its issue of May 2. It alleged that the judge then told the governor what the decision was going to be, and what members of the court would dissent. This has been denied by both, but no action for libel has been brought against the Press. It is to be noted that this alleged telephone talk was published May 2, and the opinion was delivered May 27.

The making the recorder an appointive, instead of an elective officer, is a part of the temporary adjustment provided in the schedule to bring about the change made by the act, and is not unconstitutional.

The act is not local because the power to appoint a recorder is confined to existing cities, nor is it unconstitutional because the recorders appointed under the act are to hold office until 1903, thus passing over an election and depriving the citizens of an opportunity to elect their own executive officer.

Nor is it unconstitutional because it vests in the governor the discretion of determining when it shall become operative by the appointment of the recorders; nor because it removes an elective officer, the mayor, from office during the term for which he was elected, by a mere change in the name of the office; nor because it authorizes the governor to remove an elected officer without cause; nor is it local and special legislation, and therefore opposed to sec. 7, art. 3, of the constitution, because limited to three existing cities; nor, finally, is it unconstitutional because it violates the spirit of the constitution in those provisions and that general intent which preserves to the people the right to local self-government.

It is submitted, however, that the act in question is plainly a special or local law, regulating the affairs of three existing cities only, and changing their charters; it creates offices, and prescribes the powers and duties of office in those cities, and is in direct and plain violation of said art. 3, sec. 7, of the constitution.

According to the law as laid down in this case, no town or city has any rights the legislature is bound to respect, and there is no right to local self-government. Individually any citizen may claim the protection of the court against the arbitrary exercise of power depriving him of his legal rights, even though it be attempted by the legislature. Collectively, however, the body of citizens aggregated into a town or city, is beyond the pale of law, and the judiciary is powerless to protect it against whatever the legislature may do. "*Sic volo sic jubeo*," that is all the sovereign authority need say, is the astounding doctrine in Philadelphia *v.* Fox,[1] in an opinion affirmed in the case now under review. The majority of the court affirmed the assumption that the town is purely the creature of the state and is subject to its will, in the absence of any constitutional inhibition.

---

[1] 64 Penn. St. 169, at 180 (1870).

It is most strenuously submitted that this doctrine is fundamentally unsound, and that it will lead to most mischievous results if it becomes generally accepted. It has been persistently maintained not only in Pennsylvania but also in the Supreme Court of the United States.[1] It has also been maintained in other states [2] and in other cases cited and examined in the articles on "The Right to Local Self-Government," [3] so that there is danger of its general acceptance as correct. An examination of these cases will show that in most if not all of them the affirmance of such a general doctrine is merely *dictum*, it not being necessary to the decision of the case actually before the court. It is a dangerous doctrine — one, under color of which politicians, legislators, ignorant of constitutional law, even if no worse be said of them, and judges, accepting it without adequate study of the history and development of the American colonies, are unconsciousiy coöperating to deprive our towns and cities or other units of our political system of their right to self-government in their local affairs.

Thus, in many of the last cited cases the right to local self-government is denied where the question was only as to the validity of the appointment by the governor of a board of state police over cities. In such a case it may well be held that although these officers perform their functions in a particular locality, yet the functions themselves are state functions, and hence the officers are state officers.[4] As these cases should rest on this ground, it is clearly only *dictum*, and outside of the case, to go on and to declare there is no right to local self-government. Yet that is what these cases do. It is also unfortunate that these cases arose when the right to local self-government was not so well understood as it now is, and also, that they arose and were decided in states where this right has never been prominently asserted, properly understood, nor incorporated into the very fibre of their being, as was the case in the New England settlements.

---

[1] United States *v.* Railroad Co., 17 Wall. 322 (1872); Barnes *v.* Dist. of Columbia, 91 U. S. 540 (1875); Laramie Co. *v.* Albany Co., 92 U. S. 307 (1875); Mount Pleasant *v.* Beckwith, 100 U. S. 514 (1879); Merewether *v.* Garrett, 102 U. S. 472 (1880); Met. R. Co. *v.* Dist. of Columbia, 132 U. S. 1 (1889).

[2] People *v.* Draper, 25 Barb. 344 (1857); Mayor of Baltimore *v.* State Bd. of Police, 15 Md. 376 (1859); State *v.* Covington, 29 Ohio St. 102 (1876); Burch *v.* Hardwicke, 30 Gratt. 24 (1878); Coyle *v.* McIntire, 7 Houst. (Del.) 44 (1884); State *v.* Smith, 44 Ohio St. 348 (1886); State *v.* Hunter, 38 Kan. 578 (1888).

[3] 13 and 14 HARVARD LAW REVIEW.

[4] 2 Dillon, Mun. Corps., § 773; Burch *v.* Hardwicke, 30 Gratt. 24, at 38, and many other of the above cases.

It is further to be noted that legislatures are prompted to interfere with local self-government whenever the dominant political machine of whatever party is losing its control in the particular city sought thus to be brought into subjection. The attempt is always accompanied with vehement protestations that the proposed legislation is in the interests of a sound morality, the inhabitants of the particular city having shown themselves to be incompetent to manage their own affairs. Experience has yet to show, however, that this substitution of a system of paternalism, of government by an outside body, the essence of the Roman system of the government of colonies by prefects, has made matters better, except temporarily. It is, of course, an entire denial of the essential principle of American government, that ours is a government of the people by the people, and that the best and American way for men to learn how to carry on our government is through their own self-government in local affairs.

But the constant repetition of a *dictum*, especially if it be unchallenged and repeatedly acted on and accepted as a correct statement of the law, fixes it finally too often as law, and thus what passes for law becomes accepted as law.

"And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second, 'Law by Decision;' a third column under the heading of 'Law taken for granted' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine, — the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."[1]

"I perfectly well remember, not indeed in a Court of Error, but at the time when my noble and learned friend on the woolsack was presiding with so much dignity, and so beneficially to the public, in the Court of Exchequer, a case was brought before that court, upon which it was proposed to overrule, not the *dicta*, the impressions, the fancies of the learned frequenters of Westminster Hall, but decided cases, running through a period of near 50 years, appearing in numerous reports, and laid down by all the text-writers. I believe Mr. Justice Bayley, on a particular examination of those cases, thought them clearly founded in error; they

[1] By Lord Denman in O'Connell *v.* the Queen, 11 Cl. & Fin. 155, at 372, 373.

were traced to a *dictum* uttered by Lord Mansfield in his first judicial year, which *dictum* was held by Mr. Justice Bayley to be untenable; and my noble and learned friend pronounced the unanimous judgment of his Court, denying the authority of these cases, and overruling them all. I speak of the case of Hutton *v.* Balme, 2 Younge & J. 101; 2 Cr. & J. 19; 2 Tyrr. 17; and on Error, 1 Cr. & Mee. 262; 2 Tyrr. 620; 3 Moo. & S. 1; 9 Bing. 471. The same question, in another case, came afterwards upon a writ of error, before your Lordships' House (see Garland *v.* Carlisle, 4 Cl. & Fin. 693) and your Lordships thought that you were bound by the authorities, although the principle might not be perfectly clear. But that did not prevent my noble and learned friend and the Court of Exchequer from entering into a full consideration of the question, whether in point of principle, those cases were good law, or whether they ought not to be rejected if proved to be founded on mistake; nor did any one impugn their right and their duty to examine in that way, any legal proposition."[1]

All the *dicta* of all the judges in the United States to the effect that towns are only creatures of the state, and are subject to its uncontrolled and uncontrollable will, need not deter us therefore from an examination of this subject and from coming to a very different conclusion, if the law and the facts lead us thereto.

In the case under examination, as in the previous cases in Pennsylvania, the court made no examination of the early history and development of the state. Had it done so it would have found that before Penn's charter was granted in 1681, many settlements had been made within the limits of Penn's territory and had organized themselves as towns under town government. As elsewhere in the American colonies, local self-government was self-instituted and was not the gift of any legislature. The Duke of York, afterwards James II., then ruled over what is now New York, Pennsylvania, Delaware, and part of New Jersey. "The Book of Lawes" was in force from 16 Chas. II., 1676, and it distinctly recognized, as then already existing, the English system of towns with powers of local self-government.[2]

---

[1] By Lord Denman in O'Connell *v.* The Queen, 11 Cl. & Fin. 155, at 368, 369.

[2] The most cursory examination of these laws show this. Thus, p. 39, edition of 1879, every town shall be provided with a powder magazine; p. 34, a justice of the peace may preside at any town meeting in his town; p. 33, warrants are to be issued to the constables of the several towns to summon jurymen; p. 29, any horse, mare, cow, ox, or bull, though marked, shall, if sold, be registered anew in the town sold into; p. 22, constables shall be chosen in all towns yearly by the plurality of the freeholders in each town; p. 15, fence viewers are to be appointed in each town annually by the town's constable and overseers; p. 49, every one shall pay their rate to the constable of the town and all town rates shall be made in the same manner and by the same rule as the county rate; p. 50, plainly recognizing the right to local self-

The law did not create these towns and town officers nor did it create the powers and duties of towns, townsmen, and town officers. The settlers brought a knowledge of all these things with them and organized themselves as towns which the legislatures afterwards recognized and regulated. But a power to regulate, especially upon request, is very different from a power to destroy and especially without or against request. So the early laws of all the American colonists recognized and regulated, but did not create, our system of trial by jury. In both cases the right is fundamental and institutional. The legislature regulated the exercise of each right, but it neither created nor can it destroy either right — the right to jury trial and the right to local self-government.

Our constitutions were framed under an existing state of facts and with a view to those facts. The right to local self-government and the then existing system of town, city, or county government as the unit or basis of our political system of government were facts when these constitutions were adopted. Therefore no express recognition of them was necessary to their continued existence, but they continued unless expressly put an end to by these constitutions. As they did not do this, these rights continued and continue now.[1]

Now however comes the untenable doctrine that as the legislature has the power to supervise and regulate the exercise of town powers, it has also the power to annihilate them.

It is true that the system of government inaugurated under Penn's charter did away with much of this earlier system, and the county became the unit of political power. Still enough is left to

---

government: "Whereas in perticuler Townes many things do arise, which concerne only themselves, and the well Ordering their Affairs, as the disposing, Planting, Building and the like, of their owne Lands and woods, granting of Lotts, Election of Officers, Assessing of Rates, with many other matters of a prudentiall Nature, tending to the Peace and good Government of the Respective Townes, the Constable by and with the Consent of five at least of the Overseers for the time being, have power to Ordaine such or so many peculier Constitutions as are Necessary to the welfare and Improvement of their Towne: Provided they bee not of a Crimminall Nature, And that the Penaltyes Exceed not twenty Shillings for one Offence and that they be not Repugnant to the publique Lawes: And if any Inhabitant shall neglect or refuse to observe them The Constable and Overseers shall have power to Levie such fines by distress." P. 44, "Overseers shall be eight in Number, men of good fame, and life, Chosen by the plurality of voyces of the freeholders in each Town . . ." P. 51, "All votes in the private affaires of Particular Townes shall be given and Determined by the Inhabitants, freeholders, Householders" . . . &c.

[1] See the dissenting opinion of Brown, J., in People *v.* Draper, 15 N. Y. 556, now generally considered the more correct exposition of the law on this subject.

show us that in this colony, as in every other English colony in America, the right to local self-government, through town, city, or county, was recognized as fundamental and a part of our political institutions. Therefore it was not a gift by the legislature. This is in accord with Magna Charta.[1] That this right did not receive distinct recognition in any Bill of Rights was because no one questioned its existence or thought of its possible loss. In the minds of all students of constitutional rights, as in the mind of Webster, lay the conception of "the government of a great nation over a vastly extended portion of the surface of the earth, by means of local institutions for local purposes, and general institutions for general purposes."[2]

The decision under review violates the sound principle that a constitution is not to receive a technical construction, like a common law instrument or statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them.[3]

"It is the duty of the courts to enforce the constitution as they find it. Attempts in covert modes to defeat its plain provisions must be set aside with the same certainty as when the methods are open. Even if the intention be innocent and yet the legislation comes within the constitutional prohibition, it must not be tolerated."[4]

The same court in the same state, but now differently constituted, no longer deems it necessary to follow this salutary principle.

An adroit way to elude a question and to decide against it, is to set up a false and incorrect statement of your antagonist's claim, and then, proceeding with overwhelming reasons against it, to decide the case against him, by thus sinking out of sight the true principle upon which the case should have been decided in his favor. Thus in the case under review, the opinion maintains that the court is asked to hold that a law, although not prohibited by the constitution, is void, if it violates the spirit of our institutions or impairs any rights which it is the object of a free government to protect.

---

[1] Sec. 16. "And the city of London shall have all its ancient liberties and its free customs, as well by land as by water. Furthermore we will and grant that all other Cities, Burghs, and Towns and Ports should have all their liberties and free customs."

[2] Speech of December 22, 1843, on "The Landing at Plymouth." 2 Works of Daniel Webster 207.

[3] Commonwealth *v.* Zehon, 8 W. & S. (Pa.) 386.

[4] Scranton School District's Appeal, 113 Penn. 176.

Having set up this bogey it is easy for the opinion to proceed to demolish it, which it does with a good show of learning and citation of undoubted authorities. Even the brief for the defendant and the learned address by Richard C. Dale, Esq., of counsel for the appellee, read in August, 1901, before the American Bar Association, on "Implied Limitations upon the Exercise of the Legislative Power," [1] is not free from this objectionable method of treatment.

The majority of the court could not find any unconstitutionality in the act in question of March 7, 1901, although the so-called temporary appointment of the three recorders for Pittsburg, Allegheny, and Scranton frustrates the admitted right of the voters of these cities to elect their own recorders at the next election provided by law, inasmuch as these "temporary" recorders are to remain in office until the election in 1903. Nor could they find any unconstitutionality in the act, although it provides for such "temporary" appointments in "existing cities" only, thus cutting out any cities that may subsequently become cities of the second class, through increase of population. Plainly the act was entitled "An Act for the government of cities of the second class" in order that it might not conflict with the provisions of the constitution, article 3, section 7, already cited, but obviously the restriction of its operation to existing cities only leaves it open to the objection that it is in fact a special law regulating the affairs of the three cities now constituting the second class, and also that it creates office and prescribes the powers and duties of the office created (recorder) in three cities, and is therefore unconstitutional and void.[2] If this be not so, the language in question can have no meaning the court is bound to follow.

In spite of the plain language of this constitution the supreme court of this state long ago upheld an act of the legislature dividing cities into classes.[3] This was the first step of the political machine to circumvent the provisions of the new constitution. A ready means being furnished by this decision for evading its plain terms, by gradually increasing the number of classes, as the purposes of the politicians might require, the general assembly proceeded to divide the cities of the state into five classes and subsequently into seven classes. "The law opened the gate and we

[1] See 40 Am. L. Reg. N. S. 580; 9 Am. Lawyer 432.

[2] See the series of articles, "Special Legislation in Pennyslvania," by Thomas R. White, 40 Am. L. Reg. N. S. 623.

[3] Wheeler *v.* City of Philadelphia, 77 Pa. 338.

were time and again confronted by acts, which, under the guise of general legislation, sought to evade the inhibitions of article 3." [1] By this time the court had become satisfied that abuse was being perpetrated under color of its decision in Wheeler *v.* City of Philadelphia. It proceeded to limit its application by its decisions in Scowden's Appeal [2] and in Ayar's Appeal,[3] saying,[4] "It was never intended to license indiscriminate classification as a mere pretext for the enactment of laws essentially local or special."

In the same way it will be impossible for the judiciary to follow to its legitimate and logical conclusions the principle affirmed in the case under review. As the dissent says: [5]

"Factional politics and partisan politics are not troubled by scruples. Under the principle of this decision, there is nothing to hinder a hostile partisan majority in the legislature from ousting the party in power in Philadelphia, a city of the first class, and placing its government in possession of the minority."

Worse even than this, if courts are to shut their eyes to what our legislators are openly doing, and if the right to local self-government is to be ignored and denied, there is nothing to hinder a hostile partisan majority in the legislature from abolishing the office of treasurer in all the towns and cities in the state, directing that the contents of all their treasuries be handed over to a new officer to be appointed by the governor, who, under the direction of the political machine, may be the very man behind the throne to whom the governor is indebted for his office and for whom the penal law has no terror.

"It requires but a glance at the act to see that it is an attempt to evade the constitution. It is special legislation under the attempted disguise of a general law. Of all forms of special legislation, this is the most vicious." [6]

The dissent is placed "upon the strong ground that it" (the statute in question) "is local and special legislation under the guise of a general law. Therefore it is in direct violation of section 7, article 3." [7]

"It is purely a question of law whether section 7 of the constitution has been violated, yet we, in effect, say it is the province of the legislature to decide the question, and that we will not inquire into it." [8]

---

[1] See the dissenting opinion in the case under review, 49 Atl. Rep. 360.
[2] 96 Pa. 422. [3] 122 Pa. 266. [4] P. 279. [5] P. 360.
[6] By Paxson, J., in Scowden's Appeal, 96 Pa. 422, at 425.
[7] 49 Atl. Rep. 361.
[8] 49 Atl. Rep. 360.

And the dissent well concludes : —

" I fear the time is not far distant when the pernicious results of our decision will either bring about a constitutional enactment to remedy the mischief, or move us to overrule it."

The decision is plainly erroneous, because the act in question violates the express provisions of the constitution of the state, and also because, even if the constitution were silent on the subject, it ignores the right to local self-government, one of the fundamental rights in every American state. It is another step on the downward path leading to the loss of one of our dearest and most valued legal, as well as political, rights — the right to local self-government.

Amasa M. Eaton.

PROVIDENCE, R. I.